Filed 2/4/19 In re Breanna CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re BREANNA J., a Person Coming Under the Juvenile Court Law.	B289072 (Los Angeles County Super. Ct. No. DK23759)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.J., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Karin Borzakian, Juvenile Court Referee. Conditionally affirmed and remanded with directions.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Sarah Vesecky, Senior Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

T.J. appeals from the juvenile court's jurisdiction findings and disposition order declaring her five-year-old daughter, Breanna J., a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivision (b)(1),[1] and removing Breanna from T.J. T.J. contends substantial evidence did not support the court's finding Breanna was at substantial risk of serious physical harm within the meaning of subdivision (b)(1) or the court's removal order. T.J. also contends the Los Angeles County Department of Children and Family Services and the juvenile court failed to comply with the notice and inquiry requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We agree with the latter contention, remand to allow the Department and the juvenile court to remedy those failures, and otherwise conditionally affirm the jurisdiction findings and disposition order.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Petition and Detention*

In August 2017 the Department filed a petition pursuant to section 300, subdivision (b)(1), alleging T.J.'s failure or inability to adequately supervise or protect Breanna and T.J.'s inability to provide regular care for Breanna as a result of T.J.'s mental illness, developmental disability, or substance abuse put Breanna at substantial risk of serious physical harm. The Department alleged supporting facts concerning T.J.'s history of substance

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

abuse, her "mental and emotional problems," and the unsanitary condition of her home. The Department alleged that T.J.'s mental and emotional problems included "exhibiting[ ] bizarre, delusional, paranoid and aggressive behavior and frequent and severe mood changes" and that she "failed and refused to seek mental health treatment for [her] mental health problems."

The Department's detention report explained Breanna was currently living with her maternal aunt, L.W., who reported that, over the last two years, Breanna "had been staying with [her] about 20 months" and that T.J. "was very unstable and had severe mental health issues and voluntarily gives [Breanna] to [L.W.]" L.W. also reported Breanna was overdue for a medical checkup and was not current with her immunizations. The detention report also stated the Department had obtained Breanna's medical records from the Antelope Valley Community Clinic and provided them to a Los Angeles County public health nurse for review. The nurse reported that the records indicated Breanna "was behind on her annual physical exam and immunization shots" and that her "last physical exam was on 5/20/2015."

The Department also reported that Breanna's father, T.J.'s husband, had died in September 2015 and that, when interviewed, T.J. stated she was "at the end of her wits and can no longer cope with the current situation." That situation included, according to T.J., "a conspiracy to ruin her life" involving, among other things, "the trash company refusing to pick up her trash," "the FBI [being] after her," "someone . . . sabotag[ing] her car [by] ruining the transmission," someone "trying to sabotage her financial situation," and her "fear[ ] for her life to walk to the bus stop." During the interview, T.J. was

very emotional—crying, recovering from crying, and crying again—and according to the social worker who interviewed her, she had the appearance of "I can't carry it anymore."

The detention report also described an interview with a relative living temporarily in T.J.'s home, who stated T.J. displayed "bizarre paranoid behaviors such as constantly looking out the window and locking the doors" and having "delusions that someone is 'out to get her.'" The relative said that T.J. had "severe mood changes" and that "she will be fine one minute and 'bat-shit crazy' the next." The relative also reported T.J. thought helicopters and unidentified "people" were following her.

At the detention hearing, the juvenile court made the necessary findings for detaining Breanna, including that the Department made a prima facie showing Breanna came within section 300. The court denied T.J.'s request that the court release Breanna to T.J. and ordered Breanna detained with L.W., with monitored visits for T.J. The court also ordered the Department to provide T.J. with referrals for drug testing, drug treatment, and a mental health examination.

B. *Jurisdiction and Disposition*

The juvenile court held the jurisdiction hearing over several days in December 2017 and January 2018. The court heard testimony from, among others, T.J., L.W., a dependency investigator, and two Department social workers. The court also admitted into evidence the Department's detention report, jurisdiction and disposition report, and two last-minute informations.

L.W. testified that during the previous two years T.J. would bring Breanna to stay with her for several weeks at time, then

take Breanna back for a day or two, then return her to L.W. for another several weeks. T.J. told L.W. she was bringing Breanna to stay with her because "Breanna wasn't safe in the home," but T.J. did not explain why she felt Breanna was not safe there. According to L.W., T.J.'s conversation had become increasingly incoherent after her husband died, and she now "babbl[ed]" for 15 or 20 minutes at a time, was "delusional," and "did not make any sense."

T.J. testified that she took Breanna to stay with L.W. because T.J. "didn't feel safe"; that her "car was being tampered with every time [she] would get on her feet"; that on one such occasion she said to herself, "You know what? Whoever this is, they're just trying to kill me now. I[t] was not fun and games anymore"; that there was a "conspiracy" against her involving, among other things, "the trash company" and an "evil whatever teaching" her children; that she felt "like someone's following me or something's out to get me"; that she could not "give" Breanna "protection . . . at this point in moment"; and that she had stopped visiting Breanna because "I don't trust authorities, the police." T.J. also testified that she was not seeking to have Breanna returned from L.W. and that in fact she wanted Breanna to remain with L.W. until T.J. could "get [her] life back together."

Finding the Department had proved all its allegations by a preponderance of the evidence, the juvenile court sustained the petition. Regarding T.J.'s mental and emotional problems, the juvenile court observed: "I'll note that before taking the stand, mother was animated. She appeared agitated, frustrated at counsels' table. She was interrupting the court despite being admonished. During testimony of the [Department investigator],

mother interrupted and was admonished. Mother spoke inappropriately and laughed at counsel and sometimes she spoke out loud to no one at all during the testimony of the witnesses." The court further observed: "[T.J.] appears to be grieving the loss of her husband. She believes that there is a conspiracy, that her trash, her car, and her home are being tampered with. She believes that there are other issues, as well, as she had testified that she believes are evidence of a conspiracy. [T.J.] believes that people are, basically, out to get her and she's unsure of her safety. And I found that [she] sincerely believes this. . . . So [T.J.'s] emotional issues and her fears had risen to a point that they are preventing [her] from visiting her child, Breanna, who it is clear to me she cares for a great deal. Based on the testimony of [L.W.], . . . the severity of [T.J.'s] emotional issues and her mood swings have been increasing as time passes. They are getting worse."

Proceeding to disposition, the juvenile court stated: "I understand that [T.J.] wishes the case to close and for [Breanna] to remain with [L.W.] However, in light of [T.J.'s] mental health issues, her emotional issues, and her grief, if I close the case and allow [Breanna] to remain with [L.W.], [T.J.] may take [Breanna] from [L.W.'s] home in the future, as she wishes. But at this point, I believe that based on what I heard, [T.J.] needs some help. She needs some help to get over her grief. She needs assistance with grief counseling and other mental health issues. . . . I think [T.J.'s] mental health issues need to be addressed to ensure that [she] and [Breanna] can safely reunify."

The juvenile court found, by clear and convincing evidence, that there was a substantial danger to Breanna's physical health, safety, or protection or physical or emotional well-being if she

were returned to T.J. and that there were no reasonable means to protect Breanna without removing her from T.J.'s physical custody. The court removed Breanna from T.J., placed Breanna with L.W., and ordered monitored visitation and services, including a psychiatric evaluation and mental health and grief counseling, for T.J. T.J. timely appealed.

DISCUSSION

A. *Substantial Evidence Supported the Jurisdiction Findings and Dispostion Order*

1. *Applicable Law and Standard of Review*

Section 300, subdivision (b)(1), authorizes the juvenile court to assert jurisdiction when the social services agency proves by a preponderance of the evidence that there is a substantial risk the child will suffer serious physical harm or illness "as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child" or "the inability of the parent . . . to provide regular care for the child due to the parent's . . . mental illness, developmental disability, or substance abuse." (See *In re M.R.* (2017) 7 Cal.App.5th 886, 896 [petitioner """must prove by a preponderance of the evidence that the child . . . comes under the juvenile court's jurisdiction"""]; see also *In re R.T.* (2017) 3 Cal.5th 622, 624 [the parent need not be "at fault or blameworthy for her failure or inability to supervise or protect her child"].) "Although section 300 generally requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing [citations], the court need not wait until a child is seriously abused or injured to assume jurisdiction and

take steps necessary to protect the child." (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383; accord, *In re T.V.* (2013) 217 Cal.App.4th 126, 133.) To physically remove a child from his or her parent, the juvenile court "must find, by clear and convincing evidence, the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal." (*In re T.V.*, at p. 135; see § 361, subd. (c)(1).)

"'In reviewing the jurisdictional findings and disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court.'" (*In re R.T.*, *supra*, 3 Cal.5th at p. 633; see *In re T.V.*, *supra*, 217 Cal.App.4th at p. 136 ["[w]e review the court's dispositional findings for substantial evidence"].)

2. *Substantial Evidence Supported the Jurisdiction Findings*

T.J. contends substantial evidence did not support juvenile court jurisdiction based on any of the Department's allegations. But there was substantial evidence T.J. had severe mental and emotional problems: unambiguous statements to that effect by L.W. and the relative temporarily living with T.J. and statements by T.J. that she was "at the end of her wits" and could "no longer cope." And there was substantial evidence those problems rendered T.J. incapable of adequately supervising and protecting

Breanna: T.J. often placed Breanna in L.W.'s care, with the explanation that "Breanna wasn't safe" in T.J.'s home, and T.J. continued to insist at the jurisdiction hearing that she wanted Breanna to remain with L.W. until T.J. could "get her life back together."[2] That same evidence, particularly when considered with T.J.'s recurrent concern that she could not keep Breanna safe or provide her "protection," supported a reasonable inference T.J.'s inability to supervise and protect Breanna created a substantial risk of serious harm to Breanna.

Therefore, substantial evidence supported a finding that Breanna came within the juvenile court's jurisdiction under the first clause of section 300, subdivision (b)(1), which "authorizes a juvenile court to exercise dependency jurisdiction over a child if '[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . .'" (*In re R.T.*, *supra*, 3 Cal.5th at p. 624, italics omitted; see *In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561 [subdivision (b)(1) requires the Department "to demonstrate three elements by a preponderance of the evidence: (1) one or more of the statutorily-specified omissions in providing care for the child (inability to protect or supervise the child, the failure of the parent to provide the child with adequate food, clothing, shelter, or medical treatment, or inability to provide regular care for the child due to mental

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[2] This evidence distinguishes this case from *In re Joaquin* (2017) 15 Cal.App.5th 537, on which T.J. relies, where this court held that, "[w]hatever [mother's] mental problems might be, there was no evidence that they impacted her ability to provide adequate care for her son." (*Id.* at p. 563.)

illness, developmental disability or substance abuse); (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness"].)

Most of T.J.'s arguments concerning the allegations and evidence of her mental and emotional problems challenge a finding she had a mental illness. For example, she argues that "[t]here is no evidence [she] suffered from a mental illness," that the juvenile court was not "qualified to make a diagnosis regarding mental illness," and that there was a rational basis for many of the fears she expressed about a "conspiracy" against her. The juvenile court, however, did not make a finding of mental illness, and the first clause of section 300, subdivision (b)(1), does not require one. A finding of mental illness relates to a separate ground for dependency jurisdiction under the fourth clause of subdivision (b)(1): a parent's inability "to provide regular care for the child due to the parent's . . . mental illness, developmental disability, or substance abuse." (See *In re R.T.*, *supra*, 3 Cal.5th at p. 626 ["[s]ubdivision (b)(1) . . . sets out four separate grounds for dependency jurisdiction"].) The substantial evidence supporting dependency jurisdiction under the first clause of subdivision (b)(1), which the Department alleged in the petition, was sufficient to support the juvenile court's jurisdiction findings. (See *In re A.F.* (2016) 3 Cal.App.5th 283, 289 [""[w]hen a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence""].)

T.J. argues that her mental and emotional condition did not pose a substantial risk of harm to Breanna because T.J. had placed Breanna in L.W.'s care and agreed to obtain mental health services. As the juvenile court noted, however, T.J. was free to take Breanna back from L.W. at any time, without regard to whether she (T.J.) was capable of providing adequate supervision and protection, as she once threatened to do when L.W. would not give her $40. And while T.J. may have said she would seek mental health services, the record does not show she had yet received any, let alone that treatment with a mental health provider had improved her mental and emotional condition.

3. *Substantial Evidence Supported the Disposition Order of Removal*

"'"The jurisdictional findings are prima facie evidence that the child cannot safely remain in the home."'" (*In re A.F.*, *supra*, 3 Cal.App.5th at p. 292; accord, *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492.) That evidence is particularly strong here, given T.J.'s repeatedly expressed concern that she could not keep Breanna safe or protect her, her decision to put Breanna in L.W.'s care for 20 of the 24 months preceding the filing of the petition, and her insistence at the jurisdiction and disposition hearing that she wanted Breanna to stay with L.W. until her own condition improved. In addition, L.W. reported that T.J. would sometimes drive to L.W.'s house to drop off Breanna while holding an alcoholic drink and that T.J. once threatened to drive away from L.W.'s house with Breanna after she had been drinking and still had a drink in her hand. The evidence also showed that, at the time the Department filed the petition, Breanna was overdue for

a medical checkup and not current with her immunizations.[3] Substantial evidence supported the juvenile court's removal order.

Citing *In re Jamie M.* (1982) 134 Cal.App.3d 530, T.J. suggests the juvenile court erred in removing Breanna because "there was no expert testimony giving specific examples of the manner in which [T.J.'s] behavior affected Breanna's safety." Specifically, T.J. cites the court's statement in that case that "[h]arm to the child cannot be presumed from the mere fact of mental illness of the parent and it is fallacious to assume the children will somehow be 'infected' by the parent. The proper basis for a ruling is expert testimony giving specific examples of the manner in which the mother's behavior has and will adversely affect the child or jeopardize the child's safety." (*Id.* at p. 540, fn. omitted; see *id.* at p. 537 ["[t]he basic premise of the juvenile court's order is that a schizophrenic parent will per se be detrimental to a child, as no evidence was presented to show how [mother's] illness would adversely affect her children"].)

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[3] T.J. cites a document from the Antelope Valley Community Clinic reflecting Breanna visited the clinic for a "[r]unny nose" on April 6, 2017. In that document, under the heading "Social History," the question "Are Child's Vaccinations Up To Date?" is answered "Yes." T.J. argues this document contradicts statements by L.W. and the public health nurse regarding Breanna's checkups and immunizations. The record, however, is not so clear. Breanna visited the clinic on that occasion for a specific (and seemingly mild) condition, and T.J., who suggests she took Breanna to the clinic, was apparently the source of the document's information regarding Breanna's vaccinations. In any event, substantial evidence includes evidence that is contradicted. (*In re R.T.*, *supra*, 3 Cal.5th at p. 633.)

As discussed, however, the juvenile court here did not find T.J. had a "mental illness," let alone presume a likelihood of harm to Breanna from the mere fact of such mental illness. Instead, the juvenile court's removal order rested on evidence Breanna could not safely remain in T.J.'s home because of T.J.'s failure or inability to adequately supervise and protect Breanna. That evidence suggested specific ways T.J.'s mental and emotional condition could adversely affect Breanna's safety, including by failing to provide her with adequate medical care and driving her in a car while under the influence of alcohol.

B. *The Juvenile Court and the Department Did Not Comply with ICWA*

"ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. [Citations.] For purposes of ICWA, an 'Indian child' is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (*In re Michael V.* (2016) 3 Cal.App.5th 225, 231-232; see 25 U.S.C. §§ 1902, 1903(4); § 224.1, subd. (a) [adopting federal definitions].)

"As the Supreme Court recently explained, notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. [Citation.] Notice to the parent or Indian custodian and the Indian child's tribe is required by ICWA in state court proceedings seeking foster care

placement or termination of parental rights 'where the court knows or has reason to know that an Indian child is involved.' [Citation.] Similarly, California law requires notice to the parent, legal guardian or Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court 'knows or has reason to know that an Indian child is involved' in the proceedings." (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 232; see § 224.3, subd. (d); *In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8; see also Cal. Rules of Court, rule 5.481(b)(1) [notice is required "[i]f it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480," which includes all dependency cases filed under section 300].) In addition, California law "requires any notice sent to the child's parents, Indian custodians or tribe to 'also be sent directly to the Secretary of the Interior' unless the Secretary has waived notice in writing." (*In re Michael V.*, at p. 232, quoting § 224.2, subd. (a)(4); accord, *In re Isaiah W.*, at p. 9.)

"The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a person having an interest in the child, including a member of the child's extended family, 'provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe.'" (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 232, quoting § 224.3, subd. (b)(1); see *In re Kadence P.*, *supra*, 241 Cal.App.4th at pp. 1386-1387 & fn. 9 [because only the tribe may make the determination whether the child is a member or eligible for membership, there is no general blood quantum requirement or "remoteness" exception to ICWA notice requirements]; *In re B.H.*

(2015) 241 Cal.App.4th 603, 606-607 ["a person need not be a *registered* member of a tribe to be a member of a tribe—parents may be unsure or unknowledgeable of their own status as a member of a tribe"].)

"Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a dependent child is or may be an Indian child." (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 233, quoting § 224.3, subd. (a); accord, *In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 9, 10-11.) "This affirmative duty to inquire is triggered whenever the child protective agency or its social worker 'knows or has reason to know that an Indian child is or may be involved . . . .' [Citation.] At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility." (*In re Michael V.*, at p. 233, quoting Cal. Rules of Court, rule 5.481(a)(4); see § 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4)(A).)

At the detention hearing, T.J. submitted a Judicial Council form ICWA-020 on which she checked the box indicating she was "or may be a member of, or eligible for membership in, a federally recognized Indian tribe." Beneath the box she identified the tribe as "Cherokee through grandmother [G.H.] (deceased)" and stated her aunt Laverne R. "may have more information." The juvenile court ordered the Department to "investigate the mother's claim of American-Indian ancestry" and to "give notice to the Secretary of the Interior, the Bureau of Indian Affairs, and the appropriate Indian tribes."

In its jurisdiction and disposition report, the Department stated Laverne and L.W. denied T.J. had "American Indian Heritage." At the jurisdiction hearing in January 2018, however, T.J. repeated her belief that she may "have Cherokee blood" because her deceased grandmother "was Cherokee." Citing the statements by Laverne and L.W., the juvenile court found it had no reason at that point to believe ICWA applied "to mother's side of the family," but ordered the Department "to continue its efforts in investigating notice to the appropriate tribe and the bureau as well as the Secretary of Interior."

T.J. contends the juvenile court and the Department failed to comply with ICWA because the Department never sent the notices the juvenile court ordered it to send to investigate the possibility Breanna was an Indian child through T.J.'s side of the family and the Department did not make any inquiry regarding whether Breanna might be an Indian child through her deceased father's side. The Department concedes these errors.

Therefore, we must remand the matter for the juvenile court to determine whether these mistakes have been cured and the ICWA inquiry and notice requirements satisfied. (See *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168 [a juvenile court's failure to ensure compliance with ICWA requirements "'does not mean the . . . court must go back to square one,' but that the court ensures that the ICWA requirements are met"].) If the juvenile court finds Breanna is an Indian child, it must conduct a new jurisdiction hearing on the petition, as well as all further proceedings, in compliance with ICWA and related California law. If the court finds she is not, the court's jurisdiction findings and disposition order remain in effect.

DISPOSITION

The juvenile court's jurisdiction findings and disposition order are conditionally affirmed. The matter is remanded to the juvenile court for further proceedings to comply with the inquiry and notice provisions of ICWA and California law.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.